2009

State of Utah v. Zachary Don Zaelit : Brief of Appellee

Utah Court of Appeals

Case No. 20090405-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Zachary Don Zaelit,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for theft by receiving stolen property, a second degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Stephen Roth presiding.

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for theft by receiving stolen property, a second degree felony. This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUE

Was the evidence sufficient to support Defendant's jury conviction for theft by receiving stolen property, and if not, was the insufficiency so obvious and fundamental that the trial court plainly erred by submitting the case to the jury?

Standard of Review. "To demonstrate that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show 'first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in

submitting the case to the jury.'" *State v. Diaz*, 2002 UT App 288, ¶ 32, 55 P.3d 1131 (quoting *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANN. § 76-6-408 (West 2004):

> **Text of section effective January 1, 2005**
>
> (1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

Utah R. Evid. 801

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if:
>
> (1) *Prior Statement by Witness.* The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten[.]

STATEMENT OF THE CASE

Defendant was charged with theft by receiving stolen property (automobile), a second-degree felony, under UTAH CODE ANN. §§ 76-6-408, 76-6-412(1)(a)(ii) (West 2004). R1-3. A jury convicted Defendant as charged. R120. The trial court sentenced him to an indeterminate prison term of one to fifteen years. R128. Defendant timely appealed. R133.

STATEMENT OF THE FACTS[1]

Defendant and cohort Justin Llewelyn stole Christine Armstrong's car from in front of her Salt Lake apartment and drove it to a West Jordan trailer park, where they were later apprehended.

* * *

On 21 July 2008, at approximately 9:45 p.m., Christine Armstrong saw her 1997 Toyota Camry XLE parked in front of her apartment. R143:51-53. Shortly after 4:00 a.m., when Christine got up to go to work the next morning, she noticed the Camry was gone. *Id.* at 52. She immediately called the sheriff's department, her insurance company, and the car dealership. *Id.* at 52-53. The dealership used the Camry's GPS tracking system to locate it in West Jordan City. *Id.* at 53. Christine notified the sheriff's department of the Camry's location, and the sheriff's department in turn notified the West Jordan City Police Department that the Camry had been tracked to their jurisdiction. *Id.* West Jordan officers responded to an address in a local trailer park where they recovered Christine's Camry. *Id.* at 84, 141, 157.

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[1] In keeping with well-established appellate practice, this brief recites the facts in the light most favorable to the jury verdict. *See State v. Pinder*, 2005 UT 15, ¶ 2, 114 P.3d 551; *State v. Kruger*, 2000 UT 60, ¶ 2, 6 P.3d 1116; *State v. Gordon*, 913 P.2d 350, 351 (Utah 1996).

Officer Kaer was one of several officers who responded to the trailer. *Id.* at 141. After speaking briefly with officers already on the scene, he learned that no one in the trailer had answered when officers knocked on the front door. *Id.* Officer Kaer tried knocking on the back door. *Id.* He could see an interior bedroom door through a window in the back door. *Id.* In response to his knocking, Defendant opened the bedroom door and came to the back door. *Id.* at 142. Pursuant to a search warrant, officers would later recover the license plate to Christine's Camry from that same bedroom. *Id.* at 61, 142.

Four other people were present at the trailer when the officers arrived. They were Justin Llewelyn, Copper Hinton, Britnee Emery, and the trailer owner, Justin's relative, Shauna Green. *Id.* at 84, 141, 157. Defendant, Justin, Britnee, and Copper were all interviewed at the West Jordan Police Department, with Defendant being interviewed last.[2] *Id.* at 160-61, 166. Detective Madsen assisted in all four interviews. *Id.* at 166. However, Officer Kaer took the lead in interviewing Copper and Britnee. *Id.* at 142.

Copper said she and Britnee picked up Defendant and Justin the night before near 3900 South and 900 East in Salt Lake. *Id.* at 144. According to Copper, the

[2] Shauna was not taken in for a formal interview because no evidence showed that she knew the Camry was stolen or who had stolen it. *Id.* at 159.

foursome drove around for a while and then went to an apartment complex in Salt Lake City. *Id.* Defendant and Justin got out of the car, went to another car parked at the complex, and stood by it for a moment, before getting into that car and driving it out of the parking lot. *Id.* Copper and Britnee followed Defendant and Justin, who drove the car to Shauna's trailer in West Jordan. *Id.* at 145. Defendant and Justin took some things out of the car and entered the trailer. *Id.*

Britnee, who was interviewed separately, gave an "almost identical" report. *Id.* at 148. Copper and Britnee differed only slightly on the timing of the night's events. *Id.; see also id.* at 150. Although both admitted to having taken drugs, neither claimed the drugs affected her memory. *Id.* at 151. Moreover, both were lucid and had no trouble understanding or answering Officer Kaer's questions. *Id.* at 143.

AP&P agent Olive took the lead in interviewing Justin. R143:126. Justin initially denied taking the Camry, claiming only that he had noticed it parked at Shauna's trailer earlier that morning, between 1:00 and 1:30 a.m., and that it had no license plate. *Id.* at 127-128. However, when agent Olive told Justin his prints had been found inside the Camry, Justin "started to cry," and admitted both that he had been in the Camry and that he had driven it. *Id.* at 128. When agent Olive asked Justin to make a written statement to that effect, Justin refused, stating that "he

would have access to his statement in the discovery process." *Id.* at 136. When agent Olive asked Justin if he was referring to Defendant, Justin nodded his head. *Id. see also id.* at 128, 131-32. While being transported to prison, Justin disclosed that, before the theft, Defendant had directed them to the apartment complex and pointed out the Camry. *Id.* at 129-30, 136. Justin also disclosed that all four cohorts had been inside the Camry. *Id.* at 129. Justin said that Defendant drove and that the other three were passengers. *Id.* at 129. Justin added that, at some point during the night, Defendant let Justin drive, and Justin drove the Camry to Shauna's trailer. *Id.*

Detective Madsen took the lead in interviewing Defendant. *Id.* at 161. Defendant initially agreed to talk, but was not "real compliant." *Id.* at 162. Rather than answer the detective's questions, Defendant "was . . . saying just take me to jail, just take me to f- - kin' jail, I want to get something to eat, I want some warm clothes." *Id.* Defendant admitted being with Justin the day before, but denied any wrongdoing: "I haven't done nothing, I haven't done nothing." *Id.* When asked if they would find his fingerprints in the car, Defendant said, "Well, I don't believe so." *Id.* at 168.

Detective Madsen then "left the room to give [Defendant] a minute to gain his composure" and see if "maybe he would change his mind and maybe want to be honest with [him]." *Id.* at 163. When the questioning resumed, however,

Defendant gave the officers "more of the same." *Id.* After officers left the room a second time, and after the door was shut, Detective Madsen heard Defendant scream and yell: "you could probably hear it all the way downstairs in the police station." *Id.* at 163-64. Defendant variously screamed, "'I need to talk to my lawyer, I'll talk to you when I get a lawyer and then you can watch how irritated I'll be. Sh-t, this mother f- - - - -g sh-t. F—k this, mother f- - - -rs. F- -k you.'" *Id.* at 164.

At trial, Britnee and Copper recalled picking up Defendant and Justin on the night of July 21st, but denied going to the apartment complex and seeing Defendant and Justin drive off in Christine's Camry. Rather, Copper claimed that after picking up Defendant and Justin, they drove to Justin's house where they stayed the rest of the night. *Id.* at 66-67, 87. Copper claimed that she did not remember her interview; she also did not think her memory that night was better than at trial, because she was a heavy drug user then and was on heroin. *Id.* at 68-73, 76-80. Copper was sure she would have said anything to the officers to get out of the interview room. *Id.* at 74, 81. Copper denied changing her story at trial because she was scared. *Id.* at 75.

For her part, Britnee claimed not to remember anything that happened after she and Copper picked up Defendant and Justin, because she also was high on heroin at the time. *Id.* at 88; *see also id.* at 91-92, 95. The most she could clearly recall was being awakened and taken outside the trailer by officers. *Id.* at 88, 97. Britnee

"[v]aguely" remembered talking to officers at the police station. *Id.* at 90. However, she remembered that "a lot of the stuff [she] said about [Defendant] [was] because [they] were fighting and [she] could have cared less what happened to him that night or that day." *Id.*; *see also id.* at 92, 100-101. Britnee also claimed to remember seeing only Justin in the stolen car, and seeing Justin take items from it. *Id.* at 90. Britnee believed that her memory at trial was better than it was the night the Camry was stolen. *Id.* at 94.

Justin also testified at trial and claimed sole responsibility for the car theft. *Id.* at 106; 119-120. According to Justin, he was with Defendant that night, but stole the car while they were apart. *Id.* at 106. Justin claimed that he drove the stolen Camry to Shauna's trailer at about 1:30 a.m., where he met up with Britnee and Copper, who had followed him in their car. *Id.* at 107-08. According to Justin, Defendant did not show up at the trailer until 2:00 a.m. *Id.* at 107. Justin claimed not to know how Defendant got to the trailer. *Id.* at 108. Justin testified that he stole the car because his wife had kicked him out of their car at that location, and he had seen that the Camry had a key in it. *Id.* at 109-10. He then called some people to meet him at the trailer. *Id.* at 110.

Justin denied taking anything from the Camry when he first arrived at Shauna's trailer, but said he took the license plate off around 3:00 a.m. *Id.* at 111-12.

Justin also claimed that he did not listen to agent Olive's questions during the interview and claimed not to remember anything about it. *Id.* at 115-119. Justin told the jury that he was on parole at the time of the car theft, and that he did not want to go back to prison; but in any event, he was already going back for other violations. *Id.* at 122. According to Justin, he pled guilty to stealing the Camry because he is "a firm believer that if you're guilty, then you're going to get found guilty. I was guilty, so I just pled—I got caught, I got caught for something I did and I'm going to own up to it." *Id.* at 123. But, "if [he] could have gotten away with it [he] probably would have." *Id.*

SUMMARY OF THE ARGUMENT

Defendant has not shown, and cannot show on this record, that the trial court committed plain error in submitting this case to the jury. Notably, Defendant does not dispute that all three of his cohorts gave statements to law enforcement implicating him as the car thief. Rather, Defendant claims this evidence is too unreliable to support the jury verdict because his cohorts repudiated their statements at trial. All three statements, however, were properly admitted as substantive evidence at Defendant's trial. Moreover, because all three statements were independently made and are highly corroborative of each other, they more than suffice to support the jury verdict. Defendant thus fails to show any

insufficiency in the evidence, let alone an insufficiency so obvious and fundamental that the trial court plainly erred by submitting the case to the jury.

ARGUMENT

THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S JURY CONVICTION FOR THEFT BY RECEIVING STOLEN PROPERTY; HE THUS FAILS TO SHOW THAT THE TRIAL COURT PLAINLY ERRED IN SUBMITTING THE CASE TO THE JURY

Because Defendant did not challenge the sufficiency of the evidence below, he claims that the trial court plainly erred in submitting this case to the jury. His appellate challenge is based on the claims that the State's case was "obvious[ly]" based on "uncorroborated, unreliable, unsworn, out-of-court statements." Aplt. Br. at 33.

Defendant cannot prevail on his plain error claim, however, because the statements he challenges on appeal were properly admitted as substantive evidence; as such, those statements more than sufficed to support Defendant's conviction. Defendant therefore has not shown any insufficiency in the evidence, let alone an insufficiency so obvious and fundamental that the trial court plainly erred in submitting the case to the jury.

Notably, Defendant does not assert that the State's evidence was so obviously unreliable that trial counsel was ineffective for not requesting a directed verdict.

"But if the error was plain to the court, it should also have been plain to trial counsel, who should have raised an appropriate objection." *State v. Labrum*, 881 P.2d 900, 906 (Utah App. 1994), *vacated on other grounds*, 925 P.2d 937 (Utah 1996). Defendant's failure to raise a concomitant ineffective assistance of counsel claim thus undermines his plain error claim.

"To demonstrate that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show 'first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.'" *State v. Diaz*, 2002 UT App 288, ¶ 32, 55 P.3d 1131 (quoting *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346). Defendant has not made either showing.

A court will find the evidence insufficient to support a jury verdict only when, viewed in a light most favorable to the verdict, the evidence is so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he [or she] was convicted." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (alteration in original) (citation omitted). In assessing the sufficiency of the evidence, the court will "review the evidence and all inferences which may reasonably be drawn from it in the light most

favorable to the verdict." *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94 (internal quotation marks and citation omitted).

Here, Defendant claims that the evidence was insufficient to support his conviction for theft by receiving stolen property. It was not.

The prosecution may prove theft by receiving stolen property by showing that a person received, retained, or disposed of another's property, knowing the property was stolen, or believing it was probably stolen, or that a person concealed, sold, withheld, or aided in concealing, selling, or withholding another's property, "knowing the property to be stolen, intending to deprive the owner of it." UTAH CODE ANN. § 76-6-408 (West 2004). Defendant does not dispute that the evidence implicates him as the car thief; rather, he asserts that it was too unreliable to support the verdict: "[T]he verdict is based on uncorroborated, unreliable, unsworn, out-of-court statements." Aplt. Br. at 33. As shown below, however, the evidence was neither uncorroborated nor unreliable.

As shown in the Statement of the Facts, when Christine's Camry was recovered, Justin, Britnee, and Copper, all independently made statements to law enforcement that Defendant and Justin had stolen it, and that Defendant had driven the Camry out of the parking lot of Christine's apartment before turning the wheel over to Justin, who drove the Camry to Shauna's trailer. Moreover, Justin explained

that Defendant directed the four cohorts to the apartment complex and to the Camry itself. Justin declined to make a written statement to that effect, because "he was afraid that [Defendant] would see and read [it]." R143:128, 131. Based on the statements of his three cohorts, therefore, Defendant not only knew the Camry was stolen, but he also was the one who directed the foursome to Christine's Camry in the first place, and drove it out of the parking lot, without Christine's knowledge or authorization. From this evidence, the jury was entitled to infer that Defendant received, retained, concealed, withheld, or disposed of Christine's Camry, or at the very least, aided Justin in doing so, with the intent to deprive Christine of her car. *See* UTAH CODE ANN. § 76-6-408; *see also State v. Kihlstrom*, 1999 UT App 289, ¶ 10, 988 P.2d 949 ("A person's state of mind is not always susceptible of proof by direct and positive evidence, and, if not, may ordinarily be inferred from acts, conduct, statements or circumstances") (internal quotation marks and citation omitted).

This evidence is sufficient to support Defendant's conviction even though Justin, Copper, and Britnee all retreated from their prior statements at trial. Copper testified that she was too high on heroin that night to remember anything beyond picking up Defendant and Justin earlier in the evening, and that she would have said anything to get out of the police station. R143:68-74, 76-81. Britnee, who was found sleeping in the same room from which Defendant emerged in the trailer, also

claimed to have been high on heroin and, consequently, claimed she could only vaguely recall her interrogation. *Id.* at 90-92, 95. However, Britnee did recall that she had implicated Defendant in the car theft because she was mad at him. *Id.* at 90, 92, 100-01. Justin did not claim to have been high when he talked to agent Olive, but claimed that he had not listened to the agent's questions, and that he could not remember telling the agent that Defendant had led the cohorts to Christine's apartment and car, or that Defendant had driven the Camry out of the parking lot. *Id.* at 115-119. Rather, at trial, Justin claimed that he and he alone stole the Camry. *Id.* at 106, 119-20. He also admitted that he was going back to prison for parole violations, in any event. *Id.* at 122.

Given the above, the jury heard not only the witnesses' statements implicating Defendant, but also their testimony that they did not recall their prior statements, although Britnee claimed to have falsely implicated Defendant. *See, e.g.*, R143: 90, 92, 100-01, 143, 145. The jury also heard Officer Kaer relate that he knew Britnee and Copper had been using drugs when he interviewed them, but that they were nonetheless able to understand and respond appropriately to his questions. *Id.* at 143, 151. And neither Copper nor Britnee claimed that her recent drug use affected her ability to remember or communicate with the officers. *Id.* at 151. Agent Olive

similarly observed that Justin understood the questioning and gave appropriate responses. *Id.* at 127.

The jury's decision to convict Defendant on this evidence shows that it did not find Justin's, Britnee's, or Copper's trial testimony credible or assign it much weight in light of the law enforcement evidence that contradicted it. This is the jury's prerogative. *See State v. Buck*, 2009 UT App 2, ¶ 14, 200 P.3d 674 ("[I]t is the exclusive province of the jury to weigh the competing theories of the case, in light of the evidence presented and the reasonable inferences drawn therefrom, and to conclude which one they believe"). The mere "existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict." *State v. Howell*, 649 P.2d 91, 97 (Utah 1982). Rather, where the evidence is susceptible to multiple inferences, so long as the inferences drawn by the jury are reasonable, the verdict must be upheld. *See State v. Colwell*, 2000 UT 8, ¶ 42, 994 P.2d 177; *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992).

Nevertheless, Defendant disputes that the inferences drawn by the jury here were reasonable. Defendant argues, first, that Justin's, Britnee's, and Copper's statements to police were prior inconsistent statements and, therefore, not substantive evidence. Aplt. Br. at 33. Defendant argues, second, that even if the

statements were substantive, the jury erred in relying on them because they were "uncorroborated, unreliable, unsworn, out-of-court statements." Aplt. Br. at 33.

Contrary to Defendant's arguments, Justin's, Britnee's, and Copper's prior inconsistent statements to law enforcement constitute reliable, substantive evidence even if "unsworn" and made "out of court." Aplt. Br. at 33. Rule 801(d), Utah Rules of Evidence, expressly provides that prior inconsistent statements are not hearsay: ". . . A statement is not hearsay if: (1) . . . The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten." The advisory committee note to rule 801 explains that "[s]ubdivision (d)(1) . . . deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) [the prior statement is] inconsistent or (2) the witness has forgotten, *and does not require the prior statement to have been given under oath or subject to perjury.*" Utah R. Evid. 801(d)(1)(A) Adv. Comm. Note (emphasis added); *see also State v. Ramsey*, 782 P.2d 480, 484 (Utah 1989) (recognizing rule 801(d)(1)(A) is broader than its "federal counterpart because the Utah rule does not require the out-of-court statement to be under oath"); Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 8-287 n.88 (2d. ed. 2004) (noting "[o]ther states similarly depart from the Federal Rule, including several intermountain states," and

citing as examples Arizona, California, Colorado, Montana, Nevada, and New Mexico).

Moreover, contrary to Defendant's argument, Justin's, Britnee's, and Copper's prior statements were not "uncorroborated" or "unreliable." Aplt. Br. at 33. As shown, Justin's statement corroborated Britnee's and Copper's statements, just as Britnee's and Copper's statements corroborated Justin's statement, and each other's statements. That the three cohorts initially all independently implicated Defendant as the car thief made it "more probable" that Defendant was in fact the car thief than if only one of them had implicated him. Utah R. Evid. 401 and 402. That corroboration also made it more probable that Britnee had not falsely implicated Defendant, as she later claimed at trial. R143:90, 92, 100-01.

The jury verdict was thus supported by multiple admissible substantive statements that all implicated Defendant as the car thief.

Defendant nevertheless cites *Ramsey* in support of his claim that the evidence cannot support the jury's verdict. Aplt. Br. at 33. Defendant's reliance on *Ramsey* is misplaced. In *Ramsey*, the lead opinion held that "a conviction that is based entirely on a single, uncorroborated hearsay out-of-court statement that is denied by the declarant in court under oath cannot stand." 782 P.2d at 484. The supreme court reversed Ramsey's child sexual abuse convictions because the only evidence of

abuse was the child victim's unsworn out-of-court statement to a social worker. The child later repudiated his prior out-of-court statement to the social worker under oath at trial. *Id.* at 482, 484.

Ramsey is a plurality decision and its reasoning thus has limited precedential value. *See* 782 P.2d at 487. Two justices dissented as to the sufficiency of the evidence holding, and another justice concurred in the result alone. *See id.; see also State v. Hamilton*, 2007 UT App 130U (recognizing *Ramsey*'s limited precedential value); Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 8-288 n.93 (2d. ed. 2004) (same).

But more importantly, *Ramsey* is readily distinguishable. Defendant suggests that this case is like *Ramsey* because the only evidence implicating him in the car theft was Justin's, Britnee's, and Copper's unsworn, out-of-court statements to law enforcement, which they all repudiated at trial. But this case is not like *Ramsey*. Unlike Ramsey's conviction, Defendant's conviction was not "based entirely on a single, uncorroborated hearsay out-of-court statement." *Ramsey*, 782 P.2d at 484. Rather, as shown, Defendant's conviction was supported by three independent, unsworn out-of-court statements that were properly admitted as substantive evidence under rule 801(d)(1)(A). Unlike in *Ramsey*, therefore, there was a substantial factual basis to support Defendant's theft conviction.

Defendant's reliance on cases from other jurisdictions is equally unavailing. Neither this Court, nor the Utah Supreme Court has held that multiple corroborative and independent statements properly admitted as substantive evidence under rule 801(d)(1)(A) are insufficient, as a matter of law, to support a jury verdict. Absent any such dispositive authority, Defendant cannot show plain error. *See State v. Eldredge*, 773 P.2d 29, 36 (Utah 1989) (declining to holding that trial court plainly erred where "trial court did not have the benefit of an appellate decision").

In sum, Defendant has not shown, and cannot show, that the trial court committed plain error in submitting this case to the jury. Justin's, Britnee's, and Copper's statements to law enforcement were properly admitted substantive evidence under rule 801(d)(1)(A). Therefore, their statements were sufficient to support the jury verdict. Certainly, Defendant has not shown any insufficiency in the evidence, let alone an obvious and fundamental insufficiency in the evidence. *Diaz*, 2002 UT App 288, ¶ 32 (quoting *Holgate*, 2000 UT 74, ¶ 17).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted 23 November 2009.

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CERTIFICATE OF SERVICE

I certify that on November 23, 2009, two copies of the foregoing brief were

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A digital copy of the brief was also included: ☑ Yes ☐ No

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